



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

January 5, 2016

VIA CERTIFIED U.S. MAIL - RETURN RECEIPT REQUESTED:

7009 2520 0004 2109 1144

Courtesy copy via email

Kevin Harris, President
H&S Electric, Inc.
P.O. Box 2444
Batesville, AR 72503-2444

Re: Final Determination Concerning Confidentiality of Business Information
Freedom of Information Act (FOIA) Request EPA-R6-2012-001413 [06-FOI-00083-12];
and Case No. 2:14-cv-01827-JTM-MBN [Entergy Gulf States Louisiana, LLC et al. v. EPA]

Dear Mr. Harris:

H&S Electric, Inc. ("H&S Electric") has asserted claims of confidentiality for certain information contained in the documents listed on the Document Log enclosed as Attachment 1 ("information") that is responsive to the above-referenced FOIA request to the United States Environmental Protection Agency ("EPA" or "Agency"). The volume of the information is 101 pages and covers the time period from 2004 to 2010. The information comprises invoices and a contract for work performed by H&S Electric at Entergy's Independence plant. The information was submitted to EPA by Entergy in response to EPA's Clean Air Act Section 114 Information Request dated February 14, 2011 ("Information Request").

By letter dated June 17, 2015, EPA requested that you substantiate your claims of confidentiality ("substantiation request") within 15 working days of your receipt of the substantiation request. Delivery of the substantiation request to you on July 3, 2015 was confirmed by the certified mail return receipt. Therefore, your substantiation response ("substantiation") was due by July 27, 2015. On July 9, 2015, you verbally confirmed your receipt of the substantiation request in a telephone conversation with Janet Adams in the EPA Region 6 Compliance Assurance and Enforcement Division, Air Branch. Ms. Adams advised that you could consult with an attorney. Because the Agency had not received your substantiation by the date it was due, Ms. Adams contacted you by letter dated August 24, 2015 to again request that you submit substantiation comments concerning your confidentiality claims, in accordance with the EPA regulation at 40 C.F.R. § 2.205(b)(4). The August 24 letter was received by you on August 28, 2015 and stated that if EPA does not receive your substantiation comments on or before September 18, 2015 responding directly to the questions posed in the Agency's June 17 substantiation request, any confidentiality claim your company might have will be unsubstantiated and effectively waived. Additionally, the August 24 letter included the name of and contact information for Entergy's attorney as an additional resource for you. On

September 3, 2015, you sent the following statement to Ms. Adams via email, "H&S Electric decline [sic] the release of material for this case or any future cases." You provided no additional information nor any comments supporting your claim of confidentiality.

I have carefully considered your claims. For the reasons stated below, I find that the information claimed as confidential is not entitled to confidential treatment.

DISCUSSION

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information that is obtained from a person and privileged or confidential. Information that meets the Exemption 4 requirements is commonly referred to as "Confidential Business Information" (CBI).

Initial Considerations

EPA's regulations at 40 C.F.R. § 2.208 require that business information be entitled to confidential treatment if, *inter alia*:

- (a) The business has asserted a business confidentiality claim and that claim has not expired, been waived, or been withdrawn;
- (b) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
- (c) The information is not, and has not been, reasonably obtainable by a third party without the business's consent through legitimate means (other than discovery in litigation); and
- (d) No statute specifically requires disclosure of the information.

In your September 3 email, you merely reasserted your confidentiality claim by stating solely that H&S Electric declines the release of the information for this case or any future cases. You failed to address any of the questions set forth in EPA's substantiation request other than to indicate that H&S Electric desires confidential treatment permanently. H&S Electric has offered no comments regarding whether the information has been disclosed to anyone outside the company who is not bound by an agreement not to disclose the information further or subject to other precautions; whether the information is available in any other manner to the public; and what, if any, measures H&S Electric has taken to protect the confidentiality of the information and safeguard it against unauthorized disclosure. Accordingly, H&S Electric has failed to provide any evidence that the above requirements are satisfied. Further, EPA lacks any documentation that no interceding events have negated H&S Electric's previous claim and that the information has not become stale. The information is over five years old, the majority of which is older than 7 years. Information submitted to EPA can become stale over time, as the

passage of time often erodes the likelihood of competitive harm.¹ Because H&S Electric has failed to satisfy the above requirements, you have not demonstrated that the information is entitled to confidential treatment. Moreover, as discussed below, the information does not meet the definition of trade secret or the criteria for commercial or financial information obtained from a person and privileged or confidential.

Trade Secret

The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the information and the production process. Id.

You have neither asserted a claim that the information is a trade secret, nor have you explained how the Agency's release of this information would identify a plan, formula, process, or device. H&S Electric has thus not demonstrated how disclosure of the information would identify or reveal a trade secret. Consequently, I find that the information does not constitute a trade secret.

Exempt Commercial or Financial Information

If the information does not reveal a trade secret, it may still be exempt from release under Exemption 4 of the FOIA if it is exempt commercial or financial information, i.e., "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," for purposes of Exemption 4 of the FOIA, "should be given their ordinary meanings." Pub. Citizen, 704 F.2d at 1290 (citing Wash. Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)). The information at issue relates to a business, thereby meeting the ordinary definition of "commercial." Since H&S Electric meets the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a), the information was "obtained from a person" as required by Exemption 4 of the FOIA.

Finally, in order to qualify as exempt commercial or financial information, the information must be "privileged or confidential." You have claimed the information to be confidential, but you have not claimed the information to be privileged. The Agency has no indication that the information is subject to a common-law privilege and will therefore limit its discussion to the issue of confidentiality. Information submitted to the Government on a voluntary basis "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v.

¹ Age of documents is a factor to consider in determining whether disclosure is likely to cause competitive harm. In re Agent Orange Product Liability Litigation, 104 F.R.D. 559, 575 (E.D.N.Y. 1985) (citing, e.g., case holding information "stale and not entitled to protection" after three to fifteen years); Ctr. for Pub. Integrity v. DOE, 191 F. Supp. 2d 187, 195 (D.D.C. 2002) ("Courts have recognized that the passage of time can mitigate the potential for harm that might otherwise have resulted from the release of commercial information").

NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). Information that is required to be submitted to the Government is confidential if its “disclosure would be likely either ‘(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.’” Critical Mass, 975 F.2d at 878 (quoting Nat’l Parks and Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted)).

Voluntary or Required Submission

In your September 3 email, you offered no comments concerning whether the information was a voluntary or required submittal to the Agency. Under EPA’s regulations at 40 C.F.R. § 2.201(i), voluntarily submitted information consists of business information the submission of which EPA had no statutory or contractual authority to require, as well as business information the submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability. For a submission to be required, an agency must possess the authority to require submission of information to the agency and must exercise this authority. Nat’l Parks, 498 F.2d at 770; Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin., 244 F.3d 144, 149 (D.C. Cir. 2001); Parker v. Bureau of Land Mgmt., 141 F. Supp. 2d 71, 77-79, 78 n.6 (D.D.C. 2001); see also, Critical Mass, 975 F.2d at 880.

In this case, the Agency had the authority to require the submission of the information and exercised it. It is undisputed that the information was collected expressly pursuant to EPA’s authority under Section 114 of the Clean Air Act, 42 U.S.C. § 7414. Because EPA not only has the authority to require submission of the information, but also has exercised its authority, Entergy’s submission of the information was required and was not voluntary. I will next address whether the information is confidential.

Impairment Prong

As discussed above, the test for confidentiality of commercial or financial information that is required to be submitted to the Government is governed by National Parks. Under the National Parks test, commercial or financial information that is required to be submitted to the Government is “confidential” if “disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” Id. at 770 (footnote omitted).

In addressing impairment to the Government’s ability to obtain necessary information that is required to be submitted in the future, the inquiry focuses on the likelihood that the Government will receive accurate information from the submitter. In other words, “[i]f the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment.” Wash. Post, 690 F.2d at 268. Additionally, as another court noted, “[t]o show impairment of future investigatory capabilities the agency must adduce

factual data from which the district court may infer that disclosure is likely to make others reluctant to cooperate on future investigations.” Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988). In this case, EPA has the authority under Section 114 of the Clean Air Act to enforce its requests for information. Further, the Agency has no factual data to support a conclusion that others would be reluctant to cooperate on future investigations if this information is disclosed. Therefore, the Government’s ability to obtain similar information in the future is not likely to be impaired.

Competitive Harm

As set forth in EPA’s regulations at 40 C.F.R. § 2.208, required business information is entitled to confidential treatment if “[t]he business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’s competitive position.”

To meet the competitive harm test, it is not enough to show that the release of the information would likely cause *any* potential for competitive harm. Rather, you must demonstrate a likelihood of *substantial* competitive harm in order to overcome the FOIA’s strong presumption of disclosure. CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). Further, the party seeking to avoid disclosure bears the burden of proving that the circumstances justify nondisclosure. Nat’l Parks, 547 F.2d at 679 n.20.

As set forth in the request for substantiation, in order to support a claim for confidential treatment, you must discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Further, you must explain the nature of these harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. In addition, you must explain how your competitors could make use of this information to your detriment.

In your September 3 email, you offered no comments regarding whether disclosure of the information is likely to cause substantial harm to the competitive position of H&S Electric. Therefore, I have determined that you have not demonstrated how disclosure of the information is likely to cause substantial harm to your competitive position.

Merely reasserting your confidentiality claim is insufficient to substantiate why the information is entitled to confidential treatment. Submitters are required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict. Lykes Bros. S.S. Co. v. Peña, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993). Additionally, it is appropriate to reject competitive harm claims when a submitter fails to provide adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury. Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996). Further, conclusory and generalized allegations of substantial competitive harm cannot support an agency’s decision to withhold requested documents. Pub. Citizen, 704 F.2d at 1291; Delta Ltd. v. US. Customs & Border Prot. Bureau, 384 F. Supp. 2d 138, 149 (D.C. Cir

2005); Miami Herald Publ'g Co. v. SBA, 670 F.2d 610, 614 (5th Cir. 1982); Ctr. for Pub. Integrity, 191 F. Supp. 2d at 191.

The burden of proving that the present circumstances justify nondisclosure of this information has not been met. The Court of Appeals for the District of Columbia Circuit has “emphasize[d]” that the “‘important point for competitive harm in the FOIA context ... is that it be limited to harm flowing from the affirmative use of proprietary information by competitors.’” Pub. Citizen, 704 F.2d at 1291 n.30 (quoting Mark Q. Connelly, Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 Wis. L. Rev. 207, 235-36); accord CNA, 830 F.2d at 1152 & n.158 (reiterating “policy behind Exemption 4 of protecting submitters from external injury” and rejecting submitter objections that did “not amount to ‘harm flowing from the affirmative use of proprietary information by competitors’” (quoting Pub. Citizen, 704 F.2d at 1291 n.30)).

In sum, because you have failed to explain in any way how disclosure of the information would likely cause substantial competitive harm to H&S Electric, you have failed to support any claim of competitive harm that could have been made. Accordingly, I find that EPA’s release of this information is not likely to cause substantial harm to H&S Electric’s competitive position.

CONCLUSION

For the reasons set forth above, I find that the information claimed as confidential is not a trade secret or confidential commercial or financial information. Consequently, the information is not within the scope of Exemption 4 of the FOIA. Pursuant to EPA’s regulations at 40 C.F.R. § 2.205(f), this constitutes the final EPA determination concerning your business confidentiality claims. This determination may be subject to judicial review under 5 U.S.C. §§ 701 et seq. In response to the above-referenced FOIA request, EPA will release the information to the FOIA requester on the tenth working day after the date of your receipt of this determination, unless the EPA Office of General Counsel has first been notified of your commencement of an action in Federal court (1) to obtain judicial review of this determination and (2) to obtain preliminary injunctive relief against disclosure. Even if you have commenced an action in Federal court, EPA may make this information available to the public if the court refuses to issue a preliminary injunction or upholds this determination. In addition, EPA may make this information available to the public, after reasonable notice to you, whenever it appears to the Agency that you are not taking appropriate measures to obtain a speedy resolution of the action.

Kevin Harris
Final Confidentiality Determination
Re: H&S Electric, Inc.
Page 7 of 7

Should you have any questions concerning this final determination, please call Ms. Yerusha Donaldson at (214) 665-6797.

Sincerely,


Ben Harrison
Acting Regional Counsel

cc: Kevin Miller, EPA Office of General Counsel

Megan Berge
Baker Botts L.L.P.
Counsel for Entergy
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004

ATTACHMENT 1

H&S Electric Document List

Record No.	Bates Number start	Bates Number end	Third Party 1	Date	Page Volume	Document Type
1	ISES_00008415	ISES_00008436	H&S Electric Incorp.	1/1/2004	22	Contract
2	ISES_00013554	ISES_00013554	H&S Electric Incorp.	3/1/2004	1	Invoice
3	ISES_00013556	ISES_00013556	H&S Electric Incorp.	6/1/2004	1	Invoice
4	ISES_00013956	ISES_00013956	H&S Electric Incorp.	9/22/2007	1	Invoice
5	ISES_00013957	ISES_00013957	H&S Electric Incorp.	9/22/2007	1	Invoice
6	ISES_00013985	ISES_00013985	H&S Electric Incorp.	2/9/2008	1	Invoice
7	ISES_00013986	ISES_00013986	H&S Electric Incorp.	2/9/2008	1	Invoice
8	ISES_00013995	ISES_00013995	H&S Electric Incorp.	3/22/2008	1	Invoice
9	ISES_00014045	ISES_00014045	H&S Electric Incorp.	5/3/2008	1	Invoice
10	ISES_00014073	ISES_00014073	H&S Electric Incorp.	6/28/2008	1	Invoice
11	ISES_00014083	ISES_00014083	H&S Electric Incorp.	7/12/2008	1	Invoice
12	ISES_00014084	ISES_00014084	H&S Electric Incorp.	7/12/2008	1	Invoice
13	ISES_00014095	ISES_00014095	H&S Electric Incorp.	7/26/2008	1	Invoice
14	ISES_00014096	ISES_00014096	H&S Electric Incorp.	7/26/2008	1	Invoice
15	ISES_00014118	ISES_00014118	H&S Electric Incorp.	8/9/2008	1	Invoice
16	ISES_00014119	ISES_00014119	H&S Electric Incorp.	8/9/2008	1	Invoice
17	ISES_00014120	ISES_00014120	H&S Electric Incorp.	8/9/2008	1	Invoice
18	ISES_00014149	ISES_00014149	H&S Electric Incorp.	8/23/2008	1	Invoice
19	ISES_00014156	ISES_00014156	H&S Electric Incorp.	8/23/2008	1	Invoice
20	ISES_00014184	ISES_00014184	H&S Electric Incorp.	9/6/2008	1	Invoice
21	ISES_00014185	ISES_00014185	H&S Electric Incorp.	9/6/2008	1	Invoice
22	ISES_00014228	ISES_00014228	H&S Electric Incorp.	9/20/2008	1	Invoice
23	ISES_00014311	ISES_00014311	H&S Electric Incorp.	11/1/2008	1	Invoice
24	ISES_00014312	ISES_00014312	H&S Electric Incorp.	11/1/2008	1	Invoice
25	ISES_00014474	ISES_00014474	H&S Electric Incorp.	1/12/2008	1	Invoice
26	ISES_00014475	ISES_00014475	H&S Electric Incorp.	1/12/2008	1	Invoice
27	ISES_00014476	ISES_00014476	H&S Electric Incorp.	1/12/2008	1	Invoice
28	ISES_00014482	ISES_00014482	H&S Electric Incorp.	1/26/2008	1	Invoice
29	ISES_00014483	ISES_00014483	H&S Electric Incorp.	1/26/2008	1	Invoice
30	ISES_00014484	ISES_00014484	H&S Electric Incorp.	1/26/2008	1	Invoice
31	ISES_00014494	ISES_00014494	H&S Electric Incorp.	4/5/2008	1	Invoice
32	ISES_00014513	ISES_00014513	H&S Electric Incorp.	6/28/2008	1	Invoice
33	ISES_00014514	ISES_00014514	H&S Electric Incorp.	6/28/2008	1	Invoice
34	ISES_00014517	ISES_00014517	H&S Electric Incorp.	7/12/2008	1	Invoice
35	ISES_00014521	ISES_00014521	H&S Electric Incorp.	7/26/2008	1	Invoice
36	ISES_00014522	ISES_00014522	H&S Electric Incorp.	7/26/2008	1	Invoice
37	ISES_00014527	ISES_00014527	H&S Electric Incorp.	8/9/2008	1	Invoice
38	ISES_00014553	ISES_00014553	H&S Electric Incorp.	12/6/2008	1	Invoice
39	ISES_00014558	ISES_00014558	H&S Electric Incorp.	12/20/08	1	Invoice
40	ISES_00014572	ISES_00014572	H&S Electric Incorp.	1/21/2009	1	Invoice
41	ISES_00014585	ISES_00014585	H&S Electric Incorp.	2/2/2009	1	Invoice
42	ISES_00014598	ISES_00014598	H&S Electric Incorp.	2/7/2009	1	Invoice
43	ISES_00014599	ISES_00014599	H&S Electric Incorp.	2/7/2009	1	Invoice
44	ISES_00014607	ISES_00014607	H&S Electric Incorp.	2/24/2009	1	Invoice

Record No.	Bates Number start	Bates Number end	Third Party 1	Date	Page Volume	Document Type
45	ISES_00014649	ISES_00014649	H&S Electric Incorp.	3/7/2009	1	Invoice
46	ISES_00014665	ISES_00014665	H&S Electric Incorp.	3/21/2009	1	Invoice
47	ISES_00014714	ISES_00014714	H&S Electric Incorp.	4/4/2009	1	Invoice
48	ISES_00014741	ISES_00014741	H&S Electric Incorp.	4/18/2009	1	Invoice
49	ISES_00014954	ISES_00014954	H&S Electric Incorp.	10/18/08	1	Invoice
50	ISES_00014959	ISES_00014959	H&S Electric Incorp.	11/1/2008	1	Invoice
51	ISES_00014967	ISES_00014967	H&S Electric Incorp.	11/15/08	1	Invoice
52	ISES_00014971	ISES_00014971	H&S Electric Incorp.	11/29/08	1	Invoice
53	ISES_00014972	ISES_00014972	H&S Electric Incorp.	11/29/08	1	Invoice
54	ISES_00014978	ISES_00014978	H&S Electric Incorp.	12/20/08	1	Invoice
55	ISES_00014982	ISES_00014982	H&S Electric Incorp.	1/10/2009	1	Invoice
56	ISES_00015062	ISES_00015062	H&S Electric Incorp.	5/30/2009	1	Invoice
57	ISES_00015063	ISES_00015063	H&S Electric Incorp.	5/30/2009	1	Invoice
58	ISES_00015065	ISES_00015065	H&S Electric Incorp.	6/13/2009	1	Invoice
59	ISES_00015066	ISES_00015066	H&S Electric Incorp.	6/13/2009	1	Invoice
60	ISES_00015069	ISES_00015069	H&S Electric Incorp.	6/27/2009	1	Invoice
61	ISES_00015070	ISES_00015070	H&S Electric Incorp.	6/27/2009	1	Invoice
62	ISES_00015073	ISES_00015073	H&S Electric Incorp.	7/11/2009	1	Invoice
63	ISES_00015118	ISES_00015119	H&S Electric Incorp.	6/26/2010	2	Invoice
64	ISES_00015120	ISES_00015123	H&S Electric Incorp.	6/26/2010	4	Invoice
65	ISES_00015124	ISES_00015127	H&S Electric Incorp.	7/10/2010	4	Invoice
66	ISES_00015173	ISES_00015175	H&S Electric Incorp.	10/23/10	3	Invoice
67	ISES_00015278	ISES_00015279	H&S Electric Incorp.	11/6/2010	2	Invoice
68	ISES_00015280	ISES_00015282	H&S Electric Incorp.	11/6/2010	3	Invoice
Total pages					101	